IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2007

Coram

The Honourable Mr.JUSTICE K.RAVIRAJA PANDIAN
and
The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN

Tax Case (Appeal) Nos.3, 626 and 904 of 2004
and 2432 of 2006

Commissioner of Income Tax - III,
Chennai. .. Appellant in all appeals

versus

Mangal Tirth Estates Ltd.,
769 Mount Road,
Chennai - 600 002. .. Respondent in all appeals

T.C.(A) No.3 of 2004:

APPEAL under Section 260A of the Income Tax Act against the order dated 12.6.2003 made in I.T.A.No.2037/Mds/94 on the file of the Income Tax Appellate Tribunal Madras 'C' Bench for the assessment year 1992-93.

T.C.(A) No.626 of 2004:

APPEAL under Section 260A of the Income Tax Act against the order dated 18.02.2004 made in I.T.A.No.28/Mds/97 on the file of the Income Tax Appellate Tribunal Madras 'A' Bench for the assessment year 1993-94.

T.C.(A) No.904 of 2004:

APPEAL under Section 260A of the Income Tax Act against the order dated 03.06.2004 made in I.T.A.No.1989/Mds/97 on the file of the Income Tax Appellate Tribunal Madras 'C' Bench for the assessment year 1994-95.

T.C.(A) No.2432 of 2006:

APPEAL under Section 260A of the Income Tax Act against the order dated 17.02.2006 made in I.T.A.No.44/Mds/2002 on the file of the Income Tax Appellate Tribunal Madras 'A' Bench for the assessment year 1996-97.

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TC.[A] No.3/2004:

against the I.T.Appeal No.17/94-95 dated 29.7.94 on the file of the Commissioner of Income Tax [Appeals] I Madras against the order dated 2.3.1994 in GI/P.A.No.31.084 CO.0339/92-93 on the file of the Asst. Commissioner of Income Tax, Central Circle II[4], Madras 34.

TC[A] No.626/2004:

as against ITAWT/GT/Appeal No.117/96-97, dated 9.10.96 on the file of the Commissioner of Income Tax [Appeals] I, Madras for the assessment of the year 93-94 as against Order dated 28.3.96 in PAN/GIR.No.31084-CQ-03339 on the file of the Assistant Commissioner of Income Tax, Central Circle II[4] Madras for the assessment year 93-94.

TC[A] No.904/2004

as against the Order dated 16.7.97 in Appeal NO.112/97-98 on the file of the Commissioner of Income Tax[appeal] I, Chennai against the order dated 24.03.97 in P.A.No.31.084 CQ 03339 on the file of the Asst. Commissioner of Income Tax, Central Circle III[2], Madras 34 for the assessment Year 94-95.

TC[A].2432/2006

against the Order dated 9.11.2001 in ITA.No.217/2001-2002 on the file of the Commissioner of Income Tax [A] V, Chennai against the order dated 15.3.1999 in GIR.No.3100 M on the file of the Joint Commissioner of Income Tax, Spl. Range X, Chennai for the assessment of the year 96-97.

For Appellant : Mrs.Pushya Sitaraman
Sr. Standing Counsel

For Respondent : Mr.Arvind Datar, S.C.
For M/s. Subbaraya Aiyar Padmanabhan

J U D G M E N T

CHITRA VENKATARAMAN,J.

These tax case (appeals) are preferred by the Revenue. T.C.(A) No.3 of 2004 relates to the assessment year 1992-93; T.C.(A) No.626 of 2004 relates to the assessment year 1993-94; T.C.(A) No.904 of 2004 relates to the assessment year 1994-95 and T.C.(A) No.2432 of 2006 relates to the assessment year 1996-97.

2. The issues raised in these tax cases are one and the same except the question relating to the deductibility of the entire expenditure incurred under completed contract method of accounting.

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The following are questions of law raised in these tax case appeals:

(T.C.(A)No.3 of 2004):

"1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the amenities charges paid for central air conditioning of the shops sold should be treated only as an advance and not as a trading receipt?

2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the receipt for allotment of car park should be treated as a returnable deposit, when as per the sale deed, the ownership of the shop and the car park are inseparable?

3. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the entire expenditure incurred during the year should be allowed as a deduction, although the assessee is following a "completed contract method" of accounting its income?"

(T.C.(A)No.626 of 2004):

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the amenity charges amounting to Rs.39,08,725/- was assessable as returned income of the assessee for the assessment year 1993-94?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the amount of Rs.5,16,336/- charged towards car parking space was a trading receipt liable to tax for the assessment year 1993-94?

(T.C.(A)No.904 of 2004):

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the amenities charges paid for central air conditioning of the shops should be spread over a period of five years?

2. Whether in the facts and circumstances of the case, the charges collected for air conditioning the premises should be treated as part of the sale price of the shops?

(T.C.(A)No.2432 of 2006):

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the amenities charges paid for central air conditioning of the shops sold should be treated only as an advance and not as a trading receipt?

2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the receipt for allotment of car park should be treated as a returnable deposit, when as per the sale deed, the

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ownership of the shop and the car park are inseparable?"

3. The assessee herein is a company engaged in the business of construction and sale of multi-storeyed office-cum-shopping complex, by name Spencer Plaza, Chennai. In the returns filed, the assessee claimed that as per the development agreement, the assessee has to provide air conditioning to the shops and to allot car park. Hence these receipts regarding air-conditioning was a deposit vide Clause 3 of the agreement. In any event, considering the obligation to provide the facility, the entire amount could not be assessed in the year of receipt. As regards the receipt of the car park, the assessee claimed the same as interest-free refundable deposit. Apart from this, the assessee also claimed deduction on advertisement, sales promotion and legal charges, etc. The assessee claimed loss in its return. This was rejected by the assessing authority by making addition on account of the amenity charges paid by the buyers for air conditioning the shops and for allotment of car park. The assessing authority disallowed the claim on the entirety of expenditure on advertisement, sales promotion and legal charges on the ground that the assessee followed the completed contract method of accounting. Hence, he held that only a portion of the expenditure relating to the space already constructed during the year could be allowed. Thus the amortization done in the accounts over a period of 10 years was considered as against the claim for deduction of the entire expenditure as per the Income Tax Adjustment Statement.

4. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) dismissed the appeals on all counts, taking the view that the amenities charges paid for the air-conditioning was not an advance but part of the consideration for the shops and hence, to be treated as trading receipts. The Commissioner of Income Tax also held that the transfer deed clearly stated that the reserved car park space and the shop are inseparable and hence, the consideration received on the car park could not be treated as advance. On the question of the claim for deferred revenue expenditure, the Commissioner of Income Tax upheld the Assessing Officer's view that the assessee was not entitled to adopt one method of accounting of the Company's account and modify it for income tax purpose to suit the convenience of the assessee. He held that the assessee could have only a proportion of that expenditure allowed in the year under construction on the basis of completed contract method. This resulted in the assessee preferring a further appeal to be preferred before the Tribunal. The Tribunal held that the amenity charges were not to be treated as trading receipt; so too, the receipts for the allotment of car park. On the issue of deferred revenue expenditure on legal and advertisement charges, it allowed the claim in full. On the sales promotion charges, it remanded the matter back to the Assessing Officer to consider the claim to the extent law permitted. It held that the accounting policy and the system permitted the assessee to

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distribute the expenditure over the period of six years. However, as the expenditure was incurred in one year, the claim had to be entertained. The Tribunal allowed the appeals of the assessee.

5. Aggrieved by this, the Revenue has come on appeal before this Court under Section 260(A) of the Income Tax Act, 1961.

6. Learned senior standing counsel appearing for the Revenue pointed out that the shopping complex provided all purchasers amenities such as central air conditioning and hence, the amount received in advance for air conditioning is a revenue receipt and that the same cannot be apportioned for five years. Learned counsel submitted that this is part of the consideration on sale and construction; hence a trading receipt to be taxed in entirety in the year of receipt and cannot be spread over the period of five years. As regards the deposit receipt on the allotment of car park, she submitted that since the allotment of car park is inseparable from the purchase of the shop, the same could not be treated as refundable deposit. As to the expenditure incurred on advertisement, legal and sales promotion, she submitted that the assessee had accounted for the income on a completed contract basis. Reading the various clauses of the sale agreement on allotment of car park and the air-conditioning facility in the sale agreement and the consistent system of maintenance, learned counsel submitted that the Tribunal misdirected itself in allowing the receipts to be spread over a period of five years and in granting the deduction on the expenditure. As to the claim on the deduction on legal expenses, advertisement expenses and sales promotion expenses, she submitted that consistent with the method of maintenance of accounts, the deductions on legal expenses, advertisement expenses and sales promotion expenses have to be spread over. Since the receipts and costs are taken on the basis of the completed contract, the expenses incurred cannot, in entirety, be attributed to the completed contract method.

7. Per contra, Mr.Arvind Datar, learned senior counsel appearing for the assessee pointed out that befitting the nature of the asset, the amount received on the amenities provided for was spread over for a period of five years. In terms of the contract, the assessee had an obligation to maintain the air conditioning system for a period of five years. He submitted that matching the character of the receipt with the obligation under the agreement, the Tribunal has rightly held that the receipts have to be spread over to a period of five years for the purpose of income tax liability. Referring to the matching principles as held by the Bombay High Court in 260 ITR 102 at 107 (COMMISSIONER OF INCOME-TAX Vs. TAPARIA TOOLS LTD.), he submitted that the same theory extended to the case of car park too. He emphasised that as far as the allotment of car park space is concerned, it is a refundable deposit and that whenever the owner sells his shop or the office space, the assessee has an obligation to

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refund the deposit amount to the owner. He further pointed out that the assessee has been following the mercantile system of accounting and that the assessee received the amount from persons purchasing the shops with central air conditioning facility. The assessee has not provided air-conditioning facility to the shops during the relevant year and that it provided the same only on 29.9.2002. Consequently, the amount should not be taxed in the year of receipt. The High Court held that it should be taxed only on a spread over basis in tune with the terms of the agreement to provide the facility for a period of five years. He pointed out that the distortions in the matter of arriving at the taxable income need to be avoided and that the true profit and loss picture of the company for the purpose of assessment following the real income theory is possible only by applying the matching principles concept. In the above circumstances, he submitted that there are no merits in the appeal to disturb the order of the Tribunal.

8. Heard the learned counsel on either side and perused the records.

9. It is seen that the assessee started its construction activities on the project during the previous year relevant to the assessment year 1988-89. The assessee follows the completed contract method of accounting as recommended by the Institute of Chartered Accountants for the recognition of the Revenue and allocation of related costs for the construction and development project. The consistency of following this method is reflected in the note appended to the annual reports. It is admitted by the Revenue that the said method was accepted by them. The first phase of construction was completed by the assessee during the accounting period relevant to the assessment year 1992-93. The assessee filed the return on the basis of the Income Tax Adjustment Statement declaring loss. The Income Tax Officer finalised the assessment and computed the profits and gains with reference to the method of accounting regularly employed by the assessee. The Income Tax Officer rejected the return based on the Income Tax Adjustment Statement, which did not form part of the accounts of the assessee on the view that the Assessing Officer was not in any manner bound by the adjustment statement. The Assessing Officer pointed out that the assessee had been systematically following the mercantile system of maintenance of accounts in a method whereby, revenue receipts and related costs were recognised with respect to completed phase of construction and sold. He pointed out that the assessee recognised the revenue only on the completed contract basis and costs and receipts are accumulated till the completion of the first phase of the project. During the previous year relevant to the assessment year 1992-93, the assessee had completed the first phase of construction and prepared its Profit and Loss Account.

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10. The Income Tax Officer pointed out that the entire shopping complex is a centrally air-conditioned one. As such, all buyers, in general, have the facility without any exception. He pointed out that the buyers of the office space did not enter into a separate amenity agreement and the sale consideration was inclusive of any amenity charges. He held that only in the case of shops sale, the assessee artificially broke the sale consideration through a separate agreement. In the face of the totallity of the circumstances, the attempt of the assessee to separate this receipt from the agreement and spread over it over a number of years by taking recourse to Clause 4 of the agreement was not sustainable. Read with Clause 5, the Assessing Officer held that since the receipt of the amenity charges was referable to the total consideration for the shop and relatable to the phase of construction completed during the period relevant to the assessment year and sold, the receipt was taxable as trading receipt in the year for which the sale of the respective shop space took place. The Assessing Officer pointed out that the assessee had artificially broken the sale consideration to have the amenity charges payable as a lump sum at the time of sale of the space itself. He pointed out that as per the agreement, the plant and machinery were not transferred and only the use of the facilities was sold. Hence, the cost of the plant and machinery would be capital expenditure and the accrued liability for future years on capital account.

11. A perusal of the order of the Commissioner of Income Tax (Appeals) on this aspect shows that the Commissioner of Income Tax (Appeals) rejected the plea on amenity charges and held that there was no dispute that the entire building was centrally air conditioned. There was no case for differential treatment in respect of amenity charges pertaining to office space and shop space. The Commissioner of Income Tax (Appeals) upheld the view of the Assessing Officer that the amenity charges are trading receipts linked to the sale of the space.

12. Considering the admitted fact that the entire building is centrally air conditioned, the Commissioner of Income Tax (Appeals) held that the assessing authority was justified in holding them as trading receipt linked to the sale of space. Referring to the decision of the Bombay High Court reported in (1991) 96 CTR 54 (SHREE NIRMAL COMMERCIAL LTD. Vs. CIT), the Commissioner of Income Tax Appeals held that the amenity charges are assessable as trading receipts.

13. A reading of the Tribunal's order on this issue shows that it accepted the case of the assessee by stating that the Commissioner of Income Tax (Appeals) went wrong in stating that the entire building was centrally air conditioned and that according to the assessee,

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only the commercial space situated in the ground, first and second floors were centrally air conditioned and not the office and other places. Consequently, the amenity charges should not have been assessed as income in the year under consideration. It also pointed out that the assessee had not provided the facility to the shops during the relevant assessment year and that the amount was received only from persons, who were willing to purchase the shops and this was specifically intended for the commercial space situated in the ground, first and second floors. Thus the Tribunal upheld the claim of the assessee.

14. On the question of providing car park, the assessing authority held that the car park space merged with the right over the undivided share of the land. The Revenue pointed out that, as a developer, the assessee acquired no right of ownership over the land or the superstructure. The assessee rendered his services as a developer and was transferring the use of the space to the buyer. There is no reference in the agreement as to the assignment of ownership of the basement to the assessee. The possibility of the assessee refunding the deposit on the allottee or transferring the same did not, in any way, stand in the way of the deposits treated as the receipts in the hands of the assessee. The Income Tax Officer held that the receipts were relatable only to the space constructed and sold during the year and hence revenue receipts assessable in the year. Consequently, he took the view that the question of spreading over did not arise. He pointed out that the receipts were relatable to the space constructed and sold during the year alone was considered for assessment. The assessee made an alternate plea that in the event of the Assessing Officer holding that the basement did not belong to the assessee, then the outlay would have to be allowed as a revenue expenditure, being a charge on the profits. This the assessee said was made without prejudice to its claim for depreciation. The Assessing Officer considered this and pointed out that all that the assessee had in the car park space was the right to occupy and use the basement. The space put under the ownership of the vendor or the assessee did not include the basement. He pointed out that the assessee, on his own volition, had transferred it to his capital account and had intended to use it for its own purpose. The right to use the basement was a capital asset but no depreciation was permissible on the right to use as distinguished from ownership of this portion to have the benefit of depreciation. He also held that there is no charge over profit also.

15. As regards the car park, on the first appeal, the Commissioner of Income Tax (Appeals) pointed out that the car park was transferred to various buyers after receiving consideration. Referring to Schedule 'C' of the Transfer Deed for sale of undivided share, the Commissioner of Income Tax (Appeals) noted that what was transferred to the buyers was an undivided share in the land and the apartment together with the reserved car park space, and hence were

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inseparable one, that one could not be sold or disposed of without the other. The appellate authority pointed out that the agreement stipulated that so long as the office space was reserved for the buyer and the same was transferred along with the right to occupy and use the car park, neither the principal buyer nor the subsequent buyer would be required to surrender vacant possession of the car park space to the assessee. The appellate authority pointed out that though the deposit was called refundable deposit, considering the nature of the business of the assessee, which is development and sale of property, the consideration received for assigning the rights on car parking space to various buyers was a trading receipt in the course of the appellant's business. He pointed out that the sale of car park space was linked to the sale of undivided sale of the land. Hence, he upheld the assessment as trading receipt. On appeal by the assessee, the Tribunal, however, allowed the claim of the assessee treating it as a refundable amount and hence not taxable as income.

16. On the question of deferred revenue expenditure on advertisement, sales, promotion and legal charges, it is seen that as the accounts were maintained on completed contract basis, the same was amortized over a period of ten years. However, in the Income Tax Adjustment Statement Account, the assessee claimed the entire expenditure as deduction. The Assessing Officer took the view that the benefit of the expenditure would cover even those areas still under construction and considering the method of accounting consistently employed, the Assessing Officer rejected this plea for deduction in full and held that the same was to be amortized.

17. On the question of deferred revenue expenses, the appellate authority pointed out that expenses incurred arose under the head 'advertisement, sales promotion and legal charges.' The assessee claimed entire expenditure as deduction under Section 37 of the Income Tax Act, 1961. The assessing authority pointed out that considering the completed contract method of working out the profits, only a proportion of the expenditure could be related to the space already constructed. The Commissioner of Income Tax (Appeals) rejected the plea for entire expenditure to be allowed as deduction. Taking the view that the assessee had regularly followed the completed contract method of accounting for recognition of revenue and recognised the allocation of the related cost to the particular phase of construction and development project, the appellate authority pointed out that the assessing authority rightly calculated that the profits and loss of business could be properly deduced with reference to the method of accounting adopted by the assessee. The assessee had been consistent in its method of accounting that the receipts and cost were recognised with respect to only the phase of construction, which has been completed and becomes capable of being so.

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18. In the face of the admitted position that the revenue and the expenditure were relatable to the completed method of construction, the appellate authority confirmed the assessment order. In the appeal before the Tribunal, on the question of deferred revenue expenditure claimed as deduction, the Tribunal held that the claim of the assessee as regards the sales promotion expenses spread over to ten years could not be allowed as deduction in full. The Tribunal directed the Assessing Officer to consider the claim on sales promotion expenses and allow the deduction to the extent permissible under law. As far as advertisement and legal charges are concerned, the question of spreading over did not arise and hence to be allowed in full.

19. Before adverting to the contentions of the parties herein, we need to advert to the deeds under which advances for centralised air-condition and the deposits for car parking are received and the claim considered by the authorities. Learned counsel for the respondent filed before us copies of sample documents covering sale deed of an undivided portion of the land, builder's agreement, Air conditioning agreement, car park agreement. On every sale of the shop/office space effected, the purchaser enters into a contract one with the owner viz., Spencer & Co. Ltd. for transfer of undivided share of the land and the second with the developer, the assessee herein for construction as per the specification. Apart from this, there is an agreement for providing air-conditioning facility and an agreement for providing car park facility.

20. A perusal of the sample sale deed dated 31.5.2000 for the shop shows that Spencer and Co. sold undivided share of the land. Apart from conveying the undivided share in the land, the deed contained various clauses pertaining to the enjoyment of common amenities, the rights of the developer, allotment of the car park as well as the rights of the purchaser. Schedule 'C' in the sale deed relates to the restrictions on the rights of the purchasers. Clause 'e' of Schedule 'C' refers to the sale of undivided share in the land and the apartment referred to in Schedule 'B' together with reserved car park space shall always be considered as inseparable and one cannot be sold and disposed of without the other or the others. Schedule 'D' deals with the rights included in the transfer to the purchaser. Clause 12 of the agreement shows that terraces/basement/atriums/ unreserved car park space shall always remain under the control, ownership and use of the developer or their nominees. Schedule 'E' relates to instances of expenses to be paid by the purchaser. These expenses are stated to be only "instances" without prejudice to the generality of the term "expenses and out-goings". The instances stated referred to the cost of maintenance and upkeep of all common area including repairs and replacement to the structural, sanitary, electrical, electronic or mechanical systems of the buildings. The Schedule also states that for these

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purposes, the purchaser has to enter into maintenance agreements with the agency specified by the developer. The deed also states that the developer may, at his option, require the purchaser to deposit with the specified agency a Security deposit of such sums as would yield a return equivalent to the purchaser's obligations under items (b) & (c) of Schedule 'E'. It further stipulates that in the event of the yield on the amount of the deposit not being adequate to cover such charges, the purchaser shall pay the agency such excess amount upon being advised by the agency. On transfer of the apartment, the purchaser is entitled either to transfer the security deposit standing to their credit to the transferee or to refund the deposits standing to their credit subject to the condition that the transferee enters into a fresh maintenance agreement with the company and pay such deposits as may be notified by the company.

21. A perusal of the copy of a typical Builder's agreement filed show that the builder agreed to get the conveyance of undivided share from Spencer & Co. Ltd., on condition that the proposed owner would engage the assessee to build an apartment for shop/showroom/office space and that the builder's agreement is subject to diverse other conditions contained in the sale deed to be executed. Clause 21 specifically refers that the proposed owner shall enter into such agreements for maintenance of Spencer Plaza and its appurtenances as stipulated by the builder covering upkeep of all common areas, all kinds of repairs, maintenance of elevators, air-conditioning system, standby generators, periodical colour wash of all common areas etc.

22. It is seen that in respect of sale of office space, the assessee entered into two contracts, one for the transfer of an undivided share and the second for construction as per the specification. In respect of office space, the consideration received is inclusive of the provision of amenities and they are treated as part of the revenue from the property development. As regards the sale of shop space, the assessee entered into three such agreements.

23. A sample of the air-conditioning agreement between the builder and purchaser shows that the builder shall install the necessary Central Air-conditioning Plant and accessories at their cost to enable them to extend the Air-condition facilities.

24. The agreement entered into between the purchaser and the assessee herein reveals that as per clause (1), the builder is to purchase and install necessary central air-conditioning plant and equipments and other accessories at their own cost in order to enable them to extend the central air-conditioning facility to the said apartment. The charges are fixed at Rs.250/- per sq.ft. of super built up area as deposit to the builder (Clause 3). As per Clause 4, the builder is authorised to adjust 20% of the deposit annually towards the central air-conditioning amenities to be

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provided from the date of installation of the plant for five years or appropriation of entire deposit or such percentage as may be required to be adjusted. Even after the deposit is completely adjusted, the assessee has to provide the same facility to the owner at no additional capital cost. Under Clause 4, it is stipulated that the replacement cost or repairs and maintenance are to be borne by the owners of the property. Clause 6 stipulates that the assessee has to enter into a maintenance agreement with the Plaza Maintenance and Service Ltd., for maintenance of the equipment. Clause 2 dealing with the ownership of the plant on the builder states that the same is subject to Clause 8. Clause 8 states that if the owners of not less than 75% of the total shopping and office area desire that air-conditioning plant and service should be operated and maintained by any person other than the builder, the builder is to forthwith transfer the ownership and control to the person nominated by such owners without any consideration.

25. The sum and substance of this agreement is that the plant is installed by the builder at its cost to extend the facility to the owner. The ownership of the plant, although is stated to rest on the assessee, yet it is subject to Clause 8. This only shows that the ownership of the plant and equipment rest with the assessee only on paper and that the effective ownership rest only with the apartment owner. This is inferred further by Clause 5 which states that even after the expiry of five years, adjusting the amount, the builder shall continue to provide the facility at no cost. In the face of the clauses and Schedule 'E' of the Sale deed executed by the owner in favour of the purchaser of the shop, it is clear that the status of the assessee is no more than that of a service provider and in reality with no ownership over the plant and machinery. The thrust of the agreement is that it casts an obligation to provide the same as per the terms of the sale agreement. Through a separate agreement, the cost of providing for the machinery is separately stated to claim the adjustment over a period of five years. The charges collected are the rate per square foot. In the background of the various terms of the agreements, the view of the Tribunal cannot be upheld. We reject the plea of the assessee for a spread over on the receipts relating to the amenities provided. The contract contemplates that the facility on air-conditioning is not something exclusively given to the shops alone.

26. As already seen, the assessee is in the business of construction and sale of built-up areas. Read in the context of the sale agreement and the one with the developer, the execution of a separate agreement on air-conditioning facility appears to be nothing but a device to suit the convenience of the assessee. Admittedly, the entire office-cum-shopping complex is a centrally air-conditioned one. The purchasers, without any exception, take this facility and there is no option to stay out of this common facility. Although the construction might have been split into more than one contract, as

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may be seen from the model agreement, what has been spoken to under the agreement is a part of the entire transaction of sale. Read in the background of Clause 8 of the air-conditioning agreement that the transfer would be without any consideration and the terms of the sale agreement on the rights of the purchaser to common facilities, it stands to reason that what has been collected in the name of charges for the facility extended is, in reality, recouping of the charges for the installation of the plant. As rightly pointed out by the Assessing Officer and confirmed by the Commissioner of Income Tax (Appeals) in the case of sale of the office space, the sale consideration received is inclusive of the provision for amenities and are treated as part and parcel of the property development. As such, going by the character of the receipt and having regard to the completed contract method to arrive at the Profit and Loss Account, the question of spreading over to five years in terms of the agreement providing air-conditioning facility for five years does not merit any favourable consideration from any angle. We do not agree with the reasoning of the Tribunal and the submission by the assessee. We approve of the view of the Income Tax Officer to hold that the sum received is a revenue receipt and is relatable to the phase of the completed contract during the period relevant to the assessment year and hence not entitled to the spread over of this receipt. The receipt is part of the sale consideration. Hence, going by the various terms of the agreement, we have no hesitation in accepting the submission of the learned counsel for the Revenue to assess the trading receipt in the year of receipt.

27. On the question of car park, under the terms of the sale agreement, the purchaser is allotted a car park area of an extent commensurate with the undivided share given. This is a reserved car park exclusively for the owners. It is stated that in consideration of the purchaser acquiring an undivided share in the land for the purpose of construction of a shop through the assessee/developer, the appellant/assessee was willing to allot the car parking space. The car parking space shall be utilised only for keeping the vehicles and subject to the condition referred in the maintenance of the Plaza. As rightly pointed out by the learned counsel for the Revenue, under the agreement, as per Schedule 'C', transfer of the reserved car park space is inseparable with the transfer of undivided share. Clause (e) to Schedule C of the sale deed, touches on the rights of the owner as to the car park:

> "(e) to sell or dispose of the undivided share of the land conveyed herein only along with the Apartment referred to in the Schedule "B" hereto and the reserved car park space if any. The undivided share in the land and the apartment referred to in the Schedule together with the reserved car park space shall always be considered as inseparable and one cannot be sold or disposed of without the other or others. "

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28. Clause 12 of the sale deed touches on what is given to the developer. This reads as follows:

> "The terraces/basement/atriums/unreserved car park space of the buildings in spencer plaza shall always remain under the control, ownership and use of the developer or their nominees. The developer or their nominees shall be exclusively entitled to any income that may be derived from the same. The purchaser shall have no right to object to such use of the terraces/basement/atriums/unreserved car park space on any grounds whatsoever. The use of unreserved car park space shall be regulated by the developer or their nominees. The purchaser further agree not to object to the use of common areas, amenities and lifts by the developer or its nominee/s for use of terraces/ basement/atriums/unreserved car park."

29. A reading of the model car park agreement shows that owners are to deposit a sum of Rs.35,000/- interest free and that the owners are liable to pay municipal tax and other public charges in respect of car park. Learned counsel appearing for the assesee pointed out that where the owner had surrendered the car park space so purchased, there is a reversal entry in the accounts resulting in the refund of the amount deposited.

30. Whatever might have been the reason which prompted the assessee to go for an agreement with the purchaser to deposit a certain sum with the assessee, contrary to the contention of the assessee and read in the context of the sale agreement, subject to which alone the car park agreement is entered into, the fact remains that the allotment of car park is a part and parcel of an agreement of the sale. The builder's agreement is subject to the diverse other conditions of sale. The utilisation of the car park is part of the purchaser's rights contemplated under the sale agreement. The only right that the builder has in the car park is as per Clause 12 which is an unreserved car park. Hence, the nature of the receipt for allotment of car park is car park agreement itself derives its strength only for the sale agreement and has no independent existence. It is a part of the sale consideration and a trading receipt. There are no reasons to delineate the same from the overall cost charged from the purchaser. The right of the assessee is related only to the extent of an unreserved car park to collect charges on the reserved car park. In the face of the sale agreement, the said sum is liable to be assessed at the hands of the assessee as a trading receipt without any spreading over. Consequently, the order of the Tribunal on this score cannot be accepted.

31. Learned senior counsel submitted that considering the stand of the Revenue in computing the profit and loss of the business, the

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Revenue is bound to apply the matching principle to consider the claim of the expenditure incurred to be granted in full without amortization. It may be pointed out that the assessee has been consistently following the completed contract theory for the purpose of arriving at its real income. Learned counsel appearing for the Revenue filed a copy of the Accounting Standards issued by the Institute of Chartered Accountants on accounting for construction contract. This provides for costs to be accumulated in a construction contract to work out the profit and loss of the business. The revenue of the assessee is worked out on the basis of the completion of the part phase of construction. Admittedly, the assessee completed the first phase of construction during this period. The Assessing Officer held that the method of accounting adopted by the assessee was such that the profits and gains of the assessee could be properly deduced by applying the completed contract method. It is not denied by the assessee that the adjustment statement on the basis of which the claim is made by the assessee for the spread over, did not form part of the accounts. Hence, he ignored the statement to go by the regular method by which the assessee maintained the accounts, namely, the mercantile accounting, and worked out the income as referable to the completed phase of construction. The assessment order referred to the notes under the Notes on accounts of the relevant period (1992-93) as follows:

> " Income from property development is recognised in the year in which the building space is completed and is ready for occupation by the buyers;
> (i) in respect of building space for which sale deed has been executed, irrespective of the receipt of entire consideration.
> (ii) In respect of others, on receipt of full consideration. "

32. It is seen from the order of the Assessing Officer that the assessee amortized the expenses on advertisement, sales promotion and legal charges over a period of ten years in its books of accounts, so that one-tenth of the expenses was debited to the profits of the year and the balance carried forward for set off in the subsequent year. The claim for deduction against the receipt of the current year was made only on the basis of the Income Tax Adjustment Statement. The Assessing Officer held, since the benefit of the expenditure had relevance even in respect of the space still under construction, only a proportion was taken as relatable to the year under consideration.

33. Learned senior counsel for the assessee insisted on the application of the matching principle and on the relevancy of the same in working out the real income of the assessee, lest distortion would fall on the computation. It may be seen, no materials were placed either before the authorities or before this Court to substantiate the contention that in adopting the completed contract

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method, the computation had resulted in an unrealistic picture on the right profit and loss.

34. The finding of the authorities below, particularly the Income Tax Officer, clearly shows that the assessee maintained the system of accounts on mercantile basis, adopting the completed contract method.

35. In this connection, while considering the claim of spread over of business expenditure, the decision of the Supreme Court reported in 225 ITR 802 (MADRAS INDUSTRIAL INVESTMENT CORPORATION LTD. Vs. C.I.T.) needs to be noted. The decision reported in 225 ITR 802 (MADRAS INDUSTRIAL INVESTMENT CORPORATION LTD. Vs. C.I.T.) is related to a case of a company issuing debentures at a discount. Taking note of the period of redemption of 12 years, the discount was divided over a period of 12 years and accordingly, the assessee claimed deduction as expenditure incurred for the purpose of business, split over a period of 12 years. The Apex Court held that claiming deduction of a proportionate part of the expenditure during the relevant accounting period was in conformity with the accounting practice of issuing a discount in the Discount of Debentures Account which was written off over a period of debentures. The Supreme Court pointed out that the assessee had the benefit of the money on the issuance of debentures to the business over the entire definite period. The Apex Court held that the liability was a continuing liability and hence, the liability was to be spread over for a period of 12 years. Touching on the deduction to be given to business expenditure, the Apex Court held that "ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years."

36. The said decision of the Apex Court was applied by the Bombay High Court in the decision reported in 260 ITR 102 (COMMISSIONER OF INCOME-TAX Vs. TAPARIA TOOLS LTD.). It is seen from the facts in the said decision that the assessee therein issued debentures redeemable after five years. As per the agreement, the upfront payment of interest immediately on allotment was shown in its financial statement as deferred expenditure. The assessee, however, had the benefit of the said sum to the business over the period of time. The Bombay High Court held that the liability, hence, was to be spread over a period of the debentures. In so holding, it applied the decision of the Apex Court and applied the matching principles by taking the view that in order to determine the net income of the accounting year under the mercantile system of accounting, the revenue and other incomes are matched with the cost of resources

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consumed. It held "Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred." However, in a given case like the present one, the facts may justify an assessing officer to spread the expenditure over the life of the debentures, because, allowing the entire expenditure in one year may give a distorted picture of the profits of a particular year. The High Court held that it was a continuing benefit of the business over the entire period and hence, the liability was required to be spread over the period of debentures.

37. The substance of the law laid down herein is that, in the context of the business expenditure incurred, the same have to be granted the deduction in the very same year. Yet, considering the benefit that the company may have over the years on the receipt, the claim can be considered either for deduction in the very same year or amortized over a period of years, subject to the ascertained length for which the assessee has the benefit. The deferred revenue expenditure in the reported case was allowed amortization, since lumpsum discount allowed upfront was in lieu of commitment on year to year payment and hence was a benefit referable to the period of bond. Hence, the guiding fact is, ultimately, the facts of the case must be looked at to decide on as to whether the expenditure has to be amortized or given a deduction in the same year.

38. Learned counsel appearing for the assessee argued that if the trading receipts are to be assessed this year, the expenditure cannot be amortized over the period of years. In the course of the argument, learned senior counsel for the assessee placed reliance on the decision of this Court reported in 292 ITR 399 (CIT Vs. BRILLIANT TUTORIALS P. LTD.) as to the necessity of application of the matching principles.

39. It must be noted that the assessment of the receipts as income and on the completed contract basis is referable to the facts as regards the receipt forming part of the sale and development agreement and has no relevance to the issue on the assessment on the amortisation of the expenditure. In the decision of the Apex Court and that of the Bombay High Court, there was no doubt that the assessee derived a continued benefit over the period of years. The benefit is given by way of a contractual obligation. We do not find any such facts to accept the plea of matching concept as invoked by the assessee. However as already seen, considering the nature of business, the principle laid down by the Apex Court has relevance to the facts herein for the limited purpose of understanding that the revenue expenditure, normally, must be allowed in its entirety in the year in which it is incurred, and spreading over is an exception conditioned by the facts prevailing in a particular case. Looking at the facts herein, the expenditure on advertising cannot be dissected to point out any definite benefit referable to a specified part or

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the period of the business activity, in the sense of its having relevance to the completed phase or the phase which is still under construction. Only when the benefit can reasonably be attributed as having relevance to the later year, it is possible to go for amortization. Learned senior counsel for the Revenue pointed out that even as per the mercantile system of accounts maintained, the assessee has amortized the expenditure.

40. It is no doubt true that consistent and regular method of maintenance of accounts must be given the prime weightage in ascertaining the profit and loss of an assessee's business. At the same time, as the Apex Court held in the decision reported in 225 ITR 802 (MADRAS INDUSTRIAL INVESTMENT CORPORATION LTD. Vs. C.I.T.), in the matter of granting the expenses, the facts justifying the deducting of expenses in entirety or in a spread over manner equally assumes relevance in the computation of the profit and loss.

41. The expenses amortized in the accounts consisted of legal expenses, advertisement expenses and sales promotion expenses. As far as legal expenses are concerned, the kind of the legal expenses incurred demanding the amortization is not clearly spelt out. On the expenditure on sales promotion and advertisement, given the nature of business of the assessee being one of construction and promotion of shopping complex, even going by the completed contract method, it is difficult to say that it is a one-time affair. Admittedly, the assessee has completed one phase of the project. The construction is of the whole complex. As such, taking note of the nature of business, it is not possible to say that the expenditure incurred for sales promotion and advertisement would have relevance to one portion alone. In the circumstances, it is difficult to apportion a part of this expenditure as relatable to the completed phase alone and to carry the balance to future years for adjustment. The facts peculiar to the facts of an assessment with reference to the maintenance of accounts cannot be ignored. Hence, keeping in mind the nature of business and the relevancy of expenditure and the character of the same, we uphold the order of the Tribunal in so far as legal expenses and advertisement are concerned. In the circumstances, we hold that the assessee is entitled to have the deduction of the expenditure on advertisement and legal expenses in full in the year in which it was incurred. On the question of sales promotion charges, the Tribunal remanded the matter back to the Assessing Officer to consider the claim to the extent law permitted. Taking note of the overall facts and the nature of business, we confirm the order of the Tribunal on this expenditure.

42. In the circumstances, the order of the Tribunal stands reversed as regards the charges collected on the air-conditioning facility and the deposit on car park, holding that they are revenue receipts assessable in the year of receipt; that the assessee is not entitled to spread over the same over a period of five years.

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Accordingly, Questions 1 and 2 in T.C.No.3 of 2004 and all the Questions in T.C.Nos.626 of 2004, 904 of 2004 and 2432 of 2006 stand allowed in favour of the Revenue. However, on the third question raised in T.C.No.3 of 2004, on the question of amortization of the expenses, the order of the Tribunal is confirmed; thereby the third question in T.C.No.3 of 2004 stands answered against the Revenue. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sl/ksv

To:
1. The Assistant Registrar,
Income Tax Appellate Tribunal,
Bench 'c' Rajaji Bhavan,
III Floor, Besant Nagar,
Chennai 90.

2. The Commissioner of Income Tax - III,
Chennai - 34.

3. The Commissioner of Income Tax[Appeal] I,
Madras.

4. The Commissioner of Income Tax
[Appeal] V, Chennai.

5. The Asst. Commissioner of Income Tax,
Central Circle II[4], Madras.

6. The Asst. commissioner of Income Tax,
Central Circle III[2], Madras 34.

7. The Joint Commissioner of Income Tax,
Spl. Range X, Chennai.

+ 1 CC To Mr.R.Venkat Narayanan, Advocate SR NO.70802

T.C.(A) Nos.3, 626 &
904 of 2004 & 2432/06

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